Supreme Court, U.S.
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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Antitrust Immunity

1. Doesn't the Local Government Antitrust Act of 1984 merely limit the remedies available when local government activities violate federal antitrust law, allowing injunctive relief but not damages, or does it exempt their activities altogether?

2. Mindful that *Parker* "state action" immunity is disfavored, how extensively must a state appellate court inquire and then articulate facts and law before it may conclude sufficient "state action" exists to immunize wrongful conduct, especially where the conduct impacts disabled citizens and the trial court summarily dismissed the antitrust action without making factual or legal findings relating to the *Parker* "state action" doctrine?

3. With respect to the *Parker* "state action" antitrust exemption, isn't it error to apply the "state action" test for a "state" actor, instead of the respective tests for a "municipal" actor or a "private" actor, where the actor, objectively, is a local organization acting in a contractual capacity, and only by statutory legal fiction is deemed an agency of the state for a limited purpose?

4. If a State plainly misreads its antitrust act to incorporate the *Parker* "state action" doctrine, does not the result, which confounds federalism and encourages violation of medicaid law's "freedom of choice" protection for disabled citizens, enable U.S. Supreme Court review?

Due Process For Creating Public Organization

5. What minimum formative acts and documentation does "due process of law" require before an organization can claim a public charter and clothe itself with government immunity when it injures citizens?

Corporate Disclosure Statement: Concho Residential Service, Inc., a Texas corporation ("CRS"), is not owned by a parent corporation and no publicly held company owns 10% or more of its stock. CRS owns stock in Oxford Square, Inc., a Texas corporation, that is not publicly held.

Abbreviations: CR ...Clerk's Record SCR...Supplemental Clerk's Record

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CITATION OF REPORTS

There are no published reports in this case. Texas' Third Court Of Appeals' opinion (Appendix, 20) established many new rules of state and federal antitrust law but was not published.

BASIS FOR JURISDICTION

Petitioner seeks review of a judgment of a lower state court that was subject to discretionary review by the state court of last resort. Texas' Third Court of Appeals issued its Judgment on November 12, 1999 (Appendix, 35). The Texas Supreme Court denied petitioner's petition for discretionary review on March 9, 2000 (Appendix, 37), and denied petitioner's motion for rehearing on April 27, 2000 (Appendix, 38). The basis for the U.S. Supreme Court's jurisdiction is 28 U.S.C.A. § 1257 (West 1993).

CONSTITUTION, STATUTES, REGULATIONS

15 U.S.C.A. § 35 (a) (West 1997): "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity."

42 U.S.C.A. § 1396a (a) (23) (A) (West Supp. 2000): "A State plan for assistance must-- ... provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis) who undertakes to provide him such services, ..."

42 U.S.C.A. § 12132 (West 1997): "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

U.S. Const. amend. V: "No person shall be ... deprived of life, liberty, or property, without due process of law... ."

U.S. Const. amend. XIV, § 1: " ... No State shall ... deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Procedural History

This is a suit for lost profit damages and injunctive relief by a private, Texas corporation Concho Residential Service, Inc. ("CRS") owned by Robert and Marilyn Cochran. In 1989 CRS began opening and operating fully-licensed Intermediate Care Facility/Mentally Retarded ("ICF/MR"), 6-bed homes for mentally retarded citizens in San Angelo, Texas, but suffered a high vacancy rate in its five homes and experienced financial losses because the referral center, a local public organization known as MHMR Services For The Concho Valley ("CONCHO VALLEY") would not tell inquiring persons about the availability of the homes and refused to deal with CRS. CONCHO VALLEY had been contractually given the regional responsibility for informing people of mental retardation services and facilities available in the area.

CRS sued in state district court under Texas' antitrust act in 1992, and also sued under Texas' deceptive trade practices act and other laws. CRS sued, among others, CONCHO VALLEY as an unincorporated association and some of its staff. CRS also sued Tom Green County as a principal in the unincorporated association, and sued a lobbyist corporation known as the Texas Council which CRS believed encouraged the injurious conduct.

The trial court invited defendants' counsel to file motions for summary judgment on the antitrust claims and thereafter dismissed the suit on the summary ground that no material fact issues were raised by CRS' pleadings and its summary judgment evidence. Texas' Third Court of Appeals affirmed the summary judgment and the Texas Supreme Court refused discretionary review.

Factual Chronology

1964 County must support needy mentally retarded residents.[1]

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[1] Tex. Rev. Civ. Stat. Ann. art. 2351 (Vernon 1971).

1965 MHMR Act[2] offers new "community center" option, to be exercised by written contract approved by local governing bodies.

1965-1997 No local governing bodies authorize a contract and none is ever signed to establish a community center in San Angelo.[3]

1968-1997 TOM GREEN COUNTY and CITY OF SAN ANGELO annually donate funds to MHMR organization known as CONCHO VALLEY and join others in appointing its board of trustees.[4]

1978 TDMHMR auditors find there is no record of statutorily-required contract establishing CONCHO VALLEY. CR 1687-1688, 1702.

1985 Legislature replaces grants-in-aid support of community MHMR centers with right of first refusal to TDMHMR contracts that pay local entity to provide MHMR services.[5]

1988 CONCHO VALLEY, claiming community center credentials, qualifies for "designated provider" contracts from State.[6]

Sept. 1988 TDMHMR purchases by contract CONCHO VALLEY's

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[2] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, 1965 Tex. Gen. Laws 165.

[3] CR 2802 (CV's Prod. #1); CR 3917-3918 (City's Prod. #1-#3); CR 3895 (City's Interr. #3).

[4] CR 1991-1992 (Post aff.); CR 2361 (TGC Ans. Inter.); CR 3620 (TGC Reply); CR 872 (CV's Admiss. #37).

[5] Act of May 17, 1985, 69th Leg., R.S., ch. 496, p. 2077-2078. The bill amended Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03, later codified at Tex. Health & Safety Code §531.002 (3), §534.054 (b) (Vernon 1992).

[6] Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

performance of intake and referral services and diagnosis and evaluation ("D&E") services to help mentally retarded citizens find residential placement in San Angelo. CR 3173-3246, 3224, 3239, 345, 353.

Jan. 1989 TDMHMR designates CONCHO VALLEY as the "MRA" for Tom Green and nearby counties (CR 3112, Lentz aff.), making it the referral center for MHMR services. (CR 3106, Lentz aff.).

March 6, 1989 Marilyn Cochran and Robert Cochran's business, initially named Southwest Residential Services, Inc., requests letter of need, receives memo from CONCHO VALLEY's executive director JAMES YOUNG stating there is a need for 6-bed ICF/MR Level of Care V facilities in San Angelo.[7]

March 7, 1989 CONCHO VALLEY offers to sell workshop services to Southwest Residential Services. CR 3032, para. 20; CR 3038.

June 1, 1989 TDMHMR begins purchasing by annual contract CONCHO VALLEY's performance of placement services for state school campus residents wanting to move to homes in the community. SCR 248-254.

On or before June 1989 Marilyn and Robert Cochran's business, now incorporated as Concho Residential Service, Inc. ("CRS"), pays initial licensing and inspection fees to State for right to open its first ICF/MR home. CR 3028, para. 9; CR 473, para. 2.

June 1989 Under contract with State, CRS begins operating its first 6-bed ICF/MR home in San Angelo. CR 473-474, para. 2, 6.

June 1989 CRS notifies CONCHO VALLEY it has ICF/MR home open and available for referrals. (CR 3033, aff., para. 22).

June 1989 CRS's Marilyn Cochran meets with JOE FINN, Director of Mental Retardation Services for CONCHO VALLEY, to request referral services and workshop services.[8]

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[7] CR 3031-3032, para. 19; CR 3037; Cochran aff.

[8] Cochran aff., CR 475-476, par. 9-9f; CR 3032, par. 21.

... FINN offers both types of services **provided** CRS agrees to admit to its homes **only** PPP/CP persons who are referred by CONCHO VALLEY.

.... When Marilyn Cochran rejects that restriction, FINN says CONCHO VALLEY will provide workshop services to CRS but at double normal prices. Marilyn Cochran says she'll pay it. FINN says he'll double the price again. FINN says: "This is my territory. You can't just move into someone's territory. I'll break you."

June 16, 1989 CRS receives June 16 letter from JAMES YOUNG that promises to advise inquiring persons about CRS's homes but says the center has no "referral packets" it could send CRS.[9]

July 10, 1989 JAMES YOUNG's July 10 letter to CRS says workshop services will be offered but at higher prices Sept. 1.[10]

July 21, 1989 CONCHO VALLEY's JOE FINN sends memo that workshop is full and applicants must get on waiting list.[11]

July 25, 1989 CONCHO VALLEY signs July 25, 1989 MOU with CRS in which it promises to give referral packets to CRS.[12]

Summer 1989 When CRS's Cochran tries to examine referral packets at CONCHO VALLEY under supervision of Riggs, employee SHEPPARD tries to wrestle packets from Cochran's lap. CR 488-489, R. aff., para. 8.

Sept. 1989 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[13]

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[9] Cochran aff., CR 3033, para. 22; CR 3039.

[10] Cochran aff., CR 3033, para. 23, CR 3040.

[11] Cochran aff., CR 3034, para. 25; CR 3042-3043.

[12] Cochran aff., CR 3034, para. 26; CR 3044-3035.

[13] SCR 160-182, 193-198, 202-254.

1989-1990 JOE FINN orders CONCHO VALLEY employee Wanda Riggs to stop helping place people in CRS' homes. CR 488, Riggs aff. para. 7.

Nov. 1989 "Community" center CONCHO VALLEY ironically adopts residential services policy that refuses to admit into its homes mentally retarded citizens from the community (except on temporary respite basis) and admits only those in the specially-funded PPP/CCP class (generally, persons coming from state school campuses).[14] Such discrimination appears to violate federal law. CR 1348, §6.01.

1989-1991 JOE FINN repeatedly asks Abilene State School Supt. Bill Waddill for letter instructing CONCHO VALLEY it cannot give referral packets on clients to CRS.[15]

1989-1993 Occupancy statewide in community-based ICF/MR facilities continually exceeds 90%; long waiting lists.[16]

1989-1993 CRS' occupancy rate far below 90%.[17] CRS pays annual licensing fee to State on each of 5 ICF/MR homes. CR 3028, para. 9.

1990 CONCHO VALLEY's JAMES YOUNG pressures employee Wanda Riggs to resign because Riggs keeps telling inquiring persons about local providers such as CRS. CR 489, para. 9.

Feb. 1990 State contractually purchases CONCHO VALLEY case manage-

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[14] CR 489-490 (Riggs aff., para. 10d, 10e); CR 869 (CV 1st Req Adm #24), policy at CR 218, A (2), CR 215.

[15] Waddill depo., July 1996, CR 3297-3298; King depo., July 1992, CR 734-735; CR 742-743.

[16] CR 963 (last 2 para.); CR 1003; TXMHMR Strategic Plan: FY 1993-1998, SCR 126-128; CR 3029, Cochran aff., para. 12, 13.

[17] CR 3030, Cochran aff., para 14.

ment services for mentally retarded persons. CR 3115-3122, Csn. aff.

March 5, 1990 JAMES YOUNG tells Marilyn Cochran that Riggs won't lose job if CRS will contract with CONCHO VALLEY. CR 476, para. 10.

July 30, 1990 State (TDHS) begins purchasing under contract CONCHO VALLEY's performance of diagnostic services on potentially retarded persons. CR 3165-3172, SCR 193-198

August 1990 JAMES YOUNG tells Cochran state schools keep him from giving referral packets to CRS and he is "caught in the middle".[18]

Sept. 1990 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[19]

Dec. 21, 1990 TDMHMR instructs community centers to use state directory of ICF/MR facilities to make as much information as possible available to consumers about local resources.[20]

Dec. 31, 1990 JAMES YOUNG tells Marilyn Cochran he cannot control his subordinates when they refuse to give referral packets to CRS.[21]

March 1991 Marilyn Cochran is one of few private providers invited to meeting of MRA officials from across Texas.[22]

... TEXAS COUNCIL's SPENCER MCCLURE gives speech, suggesting that private providers must submit to the terms proposed by their local MRA.

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[18] CR 476, Cochran aff., para. 11.

[19] SCR 255-344, "Contract For Services Fiscal Year 1991"; SCR 160-161, Claiborne aff.

[20] CR 866 (CV's Admiss. #12); CR 463 (Fin. aff.).

[21] CR 476, Cochran aff., para. 12.

[22] Cochran aff., CR 3034-3035, para. 27.

... After speech SPENCER MCCLURE sits down next to Marilyn Cochran, which Cochran interprets as intimidation tactic.

April 1991 TDMHMR repeats directive to MRAs to use state directory of ICF/MR facilities to fully inform inquiring parties about available resources. (CR 465-467, Finc. aff.)

June 1991 TDMHMR faults CONCHO VALLEY's referral advice for "not consistently contain[ing] available alternatives for selection of services." CR 869, CV's Adm. #23, #22, #3.

1991 CONCHO VALLEY's 1991 Directory of Community Resources omits CRS from list of residential service providers. CR 874 (Adm. #51, #52).

Sept. 1991 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[23]

April 1992 CRS sues CONCHO VALLEY et al.

April 1993 CONCHO VALLEY's initial 1993 Directory of Community Resources omits CRS. CR 874-875 (CV's Admis. #53, #54).

May 1995 TEXAS COUNCIL's MCCLURE, CREWS testify before Senate committee as only proponents for HB 553, which would give community MHMR centers blanket exemption from state antitrust law. CR 477-478, para. 16. Bill passes but with amendment negating exemption.

Record Of Raising Federal Questions

Raising Question #1. Petitioner argued that the Local Government Antitrust Act of 1984 does not exempt local government activities from federal antitrust laws, but rather limits the remedy for violations to injunctive relief. At the trial level petitioner raised this in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 283-284; at the appellate level in "Brief Of Appellant", pp. 62-63; and "Motion For Rehearing

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[23] (SCR 345-446, "Performance Contract Fiscal Year 1992"; SCR 160-161, Claiborne aff.)

Of Appellant," at p. 4. Texas' Third Court of Appeals ruled that the LGAA of 1984 "expressly immunizes all local governmental entities from antitrust liability under the Clayton Act." Appendix, at p. 26.

Raising Question #2. Petitioner argued that the State's regulation is insufficient to satisfy the *Parker* "state action" test, that Texas does not authorize community centers to regulate placement of consumers nor does Texas give centers monopoly power over the placement decision, which is up to the consumer and the consumer's family. Texas merely gives centers monopoly power over the market for information about available services. "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 295-299; and "Brief Of Appellant", p. 65, part 20. Texas' Third Court of Appeals found that sufficient state action existed, based on the most general of conclusions. Appendix, 21, 24-25.

Raising Question #3. Petitioner argued that CONCHO VALLEY is not a state entity but rather an unincorporated association of local entities, and is deemed by statutory legal fiction to be an "agency of the state" merely as a means of making the Texas Tort Claims Act apply to it, and that its designation by the state agency TDMHMR as a "mental retardation authority" was a contractual status that could be given to a private organization. Petitioner argued this at the trial level in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR 264-266, and in "Brief Of Appellant", pp. 36-38, 51-53. Texas' Third Court of Appeals ruled that community MHMR centers are "agencies of the state" and applied the *Parker* "state action" test for state actors instead of applying either of the stricter tests for municipal actors or private actors. Appendix, 25.

Raising Question #4. Petitioner argued that the Texas Antitrust Act does not incorporate the federal *Parker* "state action" exemption, and that federal medicaid law mandates a consumer's right to choose from qualified providers without improper government interference. Petitioner argued this at the trial level in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 284-286, 269-270; in "Brief Of Appellant", pp. 63-64, 57-58; and in "Motion For Rehearing Of Appellant." Texas' Third Court of Appeals ruled that the Texas Antitrust Act adopts the *Parker* "state action" exemption, Appendix, at p. 24, and never discussed freedom of choice under federal and state medicaid law.

Raising Question #5. Petitioner pleaded that CONCHO VALLEY was not a lawful community center and that the principals who participated in the association had never signed the contract required by law to establish a center. "Plaintiff's Fourth Amended Petition," CR 1402, 1408-1413. In the summary judgment proceeding petitioner pleaded that fact issues existed regarding whether a contract had been signed to create CONCHO VALLEY and whether the principals had made a colorable, good faith effort to establish CONCHO VALLEY. "Plaintiff's First Response To Defendants' Second Round Of Motions For Summary Judgment," CR 2994-2999. Petitioner argued in its trial brief that due process required an ascertainable procedure for establishing community centers, "Plaintiff's Brief Supporting Plaintiff's Responses to Defendants' Second Round of Summary Judgment Motions," p. 9, and in its "Brief of Appellant", p. 77, filed with the Third Court of Appeals. The Third Court of Appeals did not discuss the due process issue when it held that the enabling statute did not require a written contract to establish a center. Appendix, 27.

ARGUMENT

Recent scholarship suggests public enterprises can be more dangerous antitrust violators than private firms. Two scholars[24] at the American Enterprise Institute-Brookings Joint Center For Regulatory Studies opine:

> We have shown that a public enterprise may have greater incentive to engage in anticompetitive practices and circumvent antitrust laws than its private counterpart. Therefore, more stringent antitrust laws and harsher penalties for violating these laws may be appropriate for public enterprises.

D. Sappington and J. Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, AEI-Brookings Joint Center For Regulatory Studies, Working

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[24] David E.M. Sappington is the Lanzillotti-McKethan Eminent Scholar, Department of Economics, University of Florida. J. Gregory Sidak is a Senior Lecturer at Yale School of Management and the F.K. Weyerhaeuser Fellow in Law and Economics, American Enterprise Institute for Public Policy Research.

Paper 99-11 (AEI Nov. 1999), at 24.[25] They continue:

> A reduced focus on profit was shown to lead the public enterprise to price certain products below cost, to raise the costs of existing rivals, to erect entry barriers to preclude entry by potential rivals, and to understate and adopt inefficient production technologies in order to circumvent regulations designed to foster competition. Each of these activities can preclude the operation of more efficient competitors, and thereby reduce social welfare.

At 22. They observed even more recently:

> [I]n the case of a public enterprise, the plausibility of predation grows and presents a paradox: the firms that may most deserve the government's scrutiny with respect to predation are the government's own enterprises.
>
> Quite often, the less concerned the public enterprise is with profit, the stronger are its incentives to undertake activities that disadvantage the competition.
>
> [P]redation may take many forms other than predatory pricing, such as misleading advertising about a competitor's product, cutting off supply of an essential input, designing interfaces for complementary products in a way that produces incompatibility for a rival, or initiating excessive regulatory hearings or lawsuits. ... For discussion of these nonprice methods of predation, see Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* 347-64 (Free Press rev ed 1993) ... .

D. Sappington and J. Sidak, *Are Public Enterprises the Only Credible Predators?* (Book Review), 67 U.Chi.L.Rev. 271, 272, 284, 290, 291, 292 (2000). John R. Lott, Jr., the John M. Olin Law And Economics Fellow at the University of Chicago, concurred in 1999:

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[25] Available online at http://www.aei.brookings.org/publications /working/working_99_11.pdf> (visited Mar 10, 2000), at 24.

> [T]he social costs of public ownership may be substantially greater than previously believed. Predatory commitments by public enterprises are more credible ... [A]ny size public enterprise can be predatory.
>
> [W]hat is not recognized is that precisely because public enterprises are motivated by goals such as output maximization, rather than profit maximization, public enterprises face higher returns to predation. ...
>
> Several reasons why public enterprises would maximize output have been advanced. ... A larger output can raise salaries, open greater opportunities for consulting or contracting with the agency after retirement ... and increase the prestige that comes from being associated with a larger agency.
>
> Finally, by eliminating private competitors, public enterprises may reduce the political opposition to their receiving increased subsidies. ... The organized political opposition to legally imposed entry barriers for private enterprises may also be reduced.

J. Lott, Jr., *Are Predatory Commitments Credible: Who Should The Courts Believe* (1999) 61, 63, 68, 73.

Economic inefficiency in supplying MHMR services is far more devastating to consumers than inefficiency in supplying widgets. ICF/MR services are a scarce resource, but when provided, protect the mentally retarded from sexual assault and physical abuse, meet their nutritional, medical, and hygienic needs, and give them a life.

Defendants' acts denied mentally retarded citizens these vital services in three ways: citizens on waiting lists were denied access to CRS' five opened homes, CRS was financially unable to open more homes, and fewer citizens were served statewide because CRS' low-occupancy raised the State's per-resident cost of funding ICF/MR. Further, statewide efficiency was harmed because without more CRS homes the ratio of efficient private ICF/MR homes to inefficient government operated homes was lower.[26] Efficiency cannot be

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[26] Cochran aff., CR 474, par. 8; CR 3030, par. 15-16.

achieved if community centers, in their clearinghouse role, do not inform consumers of the private ICF/MR homes available.

Perhaps anticipating that the distinction between private and public enterprise would continue to blur, Texas framed the Texas Free Enterprise and Antitrust Act of 1983[27] to expressly extend to all public enterprises ("any ... public or private group, however organized") except cities and the State, its departments, and administrative agencies.[28] As such, Texas' Antitrust Act applies to community MHMR centers, the counties that form and fund them, and private parties with whom they combine to restrain trade.

Texas' Antitrust Act scrutinizes local public enterprises' actions more closely than federal law does. It exempts their anticompetitive conduct only if it is "required or affirmatively approved" by state or federal law.[29] This is much stricter than the "state supervision" test of *Parker v. Brown*.[30]

Defendants' restraints on trade, far from being "required or affirmatively approved" by law, directly contravened state and federal MHMR law and rules that require full disclosure of available residential facilities and mandate freedom of choice without improper government interference.

The Texas Antitrust Act's scrutiny of public enterprises is not diluted by federal law. It specifies that federal judicial interpretations shall be followed only to the extent they promote competition in goods and services to benefit consumers.[31] That limitation spurns federal interpretations that allow anticompetitive behavior, chief of which are judicially-crafted exemptions such as the *Parker* "state action" doctrine.

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[27] Texas Free Enterprise and Antitrust Act of 1983, 68th Leg., R.S., ch. 519, 1983 Tex. Gen. Laws 3010, codified at Tex. Bus. & Com. Code §15.01 et seq. (West 1994).

[28] Tex. Bus. & Com. Code, §15.03 (3), §15.05 (a), (b) (West 1994) (Apndx J).

[29] Tex. Bus. & Com. Code,1 §15.05 (g) (West 1994).

[30] *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 314 (1943).

[31] Tex. Bus. & Com. Code, §15.04 (West 1994).

QUESTION #1. Local Government Antitrust Act of 1984 Misinterpreted, Merely Limits Remedies. Petitioner respectfully submits that the Local Government Antitrust Act of 1984, 15 U.S.C.A. §§ 34-36 (West 1997), does not exempt local government activities from federal antitrust law, but rather limits the remedy available when their activities violate antitrust law. It bars recovery of damages, interest on damages, costs or attorney's fees. Injunctive relief is not barred. Texas' Third Court of Appeals erred in holding that the LGAA exempts activities, and therefore exempts Texas counties, such as Tom Green County, from antitrust scrutiny (Appendix, 26).

Moreover, the Third Court of Appeal's alternate ruling (Appendix, 26), that Tom Green County was immunized by Texas' "state action" exemption in Texas' antitrust act, is wrong. Texas' narrowly-drawn "state action" exemption immunizes actions only if they are "required or affirmatively approved" by state or federal law:

> .... Nothing in this section shall apply to actions required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the agency with such power.

Tex. Bus. & Com. Code §15.05 (g) (West 1994). The argument on Question #4 below shows that CONCHO VALLEY's injurious conduct violated state and federal law and policy; it was neither required nor approved. As a controlling principal Tom Green County is vicariously liable for the antitrust violations of its unincorporated association CONCHO VALLEY.

QUESTION #2. Insufficient *Parker* Inquiry By State Courts. One element of the *Parker* "state action" doctrine must be the level of inquiry required of a court. Since "state action" immunity is disfavored , F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992), the bar should be set higher. Because a "state action" finding in this case would immunize wrongful conduct that injures **disabled** citizens, perhaps the bar should be raised even further.

Petitioner respectfully submits that the state courts did not manifest sufficient inquiry or explanation of the finding of *Parker* "state action". The inquiry and explanation were inadequate as a matter of due process,[32] as a

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[32] U. S. Const. amend. V, XIV.

matter of the threshold for invoking a disfavored immunity, and as a matter of providing disabled citizens with access to judicial resources.

The trial court made no findings regarding "state action". The Third Court of Appeals never discussed whether the state has any practical control or effective enforcement authority over a community MHMR center that violates the law in the manner chronicled in the Chronology above at 2. The Court did not discuss consumers' dependence on the community center for information about available facilities, the role of consumers and their families in selecting a facility under medicaid's freedom of choice law, or the fact that federal and state laws and policies require community centers to fully inform consumers of available facilities. With all due respect, petitioner submits that the court of appeals was impermissibly casual and vague in finding sufficient state action to excuse the wrongful antitrust conduct. Appendix, 21, 24-25.

Even the Third Court of Appeals may lack confidence in its findings. Although its lengthy opinion (Appendix, 20-34) established more new rules of law governing the Texas Free Enterprise and Antitrust Act of 1983 than any reported case in that Act's 17-year history, and though creating new law is the cardinal criterion for publishing Texas opinions, T.R.A.P. 47.4 (a), the court ordered that it not be published (Appendix, 34).

Since petitioner is proceeding under a "private attorney general" statute (the Texas Antitrust Act provides for treble damages, Appendix, 7) which benefits consumers of mental retardation services, the Americans With Disabilities Act ("ADA") may apply. Innovative Health Systems v. City of White Plains, 117 F.3d 37, 46-47 (2nd Cir. 1997). The ADA expressly recognizes that disabled citizens have been relegated to a position of political powerlessness in our society and often have had no legal recourse to redress discrimination with respect to their access to public services and their relegation to lesser services. 42 U.S.C.A. §12101 (a) (3), (4), (5), (7). The ADA directs that disabled citizens not be denied the benefits of a public entity's services and activities. 42 U.S.C.A. §12132. This should extend to a state appellate court's judicial effort and expertise in writing opinions and willingness to publish them.

QUESTION #3. Legal Fiction Cannot Guide "State Action" Test. Petitioner respectfully submits that Texas' Third Court of Appeals wrongly stated the *Parker* "state action" doctrine as requiring the "state actor" test where one is a "state actor" only by legal fiction. The court should have stated that the "municipal actor" test, which it noted carries a higher burden (Appendix, 25) or the "private actor" test, is required, because CONCHO

VALLEY, objectively, is a local organization and its MRA status and referral and placement duties are contractual and conferrable on private entities.

In 1979 community MHMR centers were deemed by statutory legal fiction "an agency of the state and a unit of government"[33] to make the Texas Tort Claims Act apply to them. That should be no more dispositive of their true nature than the other amendments to the community MHMR center enabling act which stipulate a center shall be considered "a governmental unit, and a unit of local government" (1987[34]), and "a local government" and "a political subdivision" (1997[35]). Such contradictory designations can only co-exist as legal fictions imposed for **limited** statutory purposes.

Objectively, a lawfully-organized community MHMR center is an unincorporated association of the government agencies that choose to establish and operate it. The Texas AG has opined that a center is a "component part" of the local governments that create it, and the local governments can be liable for the torts of the center's agents.[36] Like typical associations,[37] the principals establish it and appoint persons to manage it.

Under the original 1965 community center enabling act,[38] a host of governmental agencies could be principals in the community center. The list was shortened in 1969 to include only municipalities, counties, hospital

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[33] Act of May 24, 1979, 66th Leg., R.S., ch. 797, §1, 1979 Tex. Gen. Laws 2028, applying Texas Tort Claims Act to centers.

[34] Act of June 1, 1987, 70th Leg., R.S., ch. 956, §3.01, 1987 Tex. Gen. Laws 3212, applying Interlocal Cooperation Act, et al.

[35] Act of May 25, 1997, 75th Legis., R.S., ch. 835, §1, 1997 Tex. Gen. Laws 2676, applying laws regarding bonds, insurance risk pool for employees.

[36] Op. Tex. Att'y Gen. Nos. M-538 (1969), at 3-4; H-375 (1975) summary at 3.

[37] Oil Lease & Royalty Syndicate v. Beeler, 217 S.W. 1054, 1057 (Tex. Civ. App.-Dallas 1920, writ ref'd).

[38] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, §3.01 (a), 1965 Tex. Gen. Laws 171.

districts, and school districts.[39] Unlike the political subdivisions and bodies politic that establish it, a community center is not a distinct, self-supporting entity. As a classic unincorporated association, it is statutorily configured to depend on its principals for direction and support:

(1) the enabling act speaks of a center generally as an "organizational combination"[40] and conspicuously omits declaring it a "body politic" or "corporate body",[41]

(2) centers lack the means to be distinct political subdivisions[42] since

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[39] Act of May 21, 1969, 61st Leg., R.S., ch. 688, §3, 1969 Tex. Gen. Laws 2012; codified at Tex. Health & Safety Code Ann. §534.001 (a) (Vernon 1992).

[40] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (a) (Vernon Supp. 1988); recodified at Tex. Health & Safety Code Ann. §534.-001 (a) (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §3, 1991 Tex. Gen. Laws 2016, amending art. 5547-203, §3.01 (a).

[41] Contrast this to general law and special law **municipalities** being "**incorporated**", Tex. Loc. Gov't Code Ann. §§5.001, 5.002, 5.003, 5.901, 5.903, 6.001, 6.002, 6.003, 6.011, 7.001-7.008, 8.001-8.006, home-rule municipalities being "**a body politic**", Tex. Loc. Gov't Code §51.074, **counties** being "**legal subdivisions** of the State,"Tex. Const. art. XI, §1, and "**a corporate and political body,**" Tex. Loc. Gov't Code Ann. §71.001, **conservation and reclamation districts** being "**bodies politic and corporate**", Tex. Const. art. XVI, §59 (b), **hospital district boards** in counties of 75,000 or less being "a **corporate body**", Tex. Health & Safety Code Ann. §282.041 (b), an **emergency services district** "**a political subdivision**", Tex. Health & Safety Code Ann. §775.031 (a).

[42] Tax authority is a defining attribute of political subdivisions. Guaranty Petroleum Corporation v. Armstrong, 609 S.W.2d 529, 530 (Tex. 1980) (political subdivision can assess, collect taxes); Bolen v. Board of Firemen, Policemen and Fire Alarm Operators' Trustees, 308 S.W.2d 904, 905 (Tex. Civ. App.-San Antonio 1957, writ ref'd) (political subdivision contemplates geographical bound-

they have no tax authority,

(3) the local governments' role is permanent - after they "establish" the community center they are to "operate"[43] it and are "participating" agencies (see fn 46 below),

(4) the local governments are given the means to "operate" the center, because they appoint the governing board (and can appoint themselves)[44] and only they can donate tax revenue to the center,[45]

(5) local governments could not constitutionally donate funds to their center if it were legally separate from them, [46]

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aries, public elections, public officials, taxing power and a general public purpose or benefit).

[43] "[E]stablish and operate", Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (a) (Vernon Supp. 1988), now at Tex. Health & Safety Code Ann. §534.001 (a) (Vernon 1992) and at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §3, 1991 Tex. Gen. Laws 2016, amending art. 5547-203, §3.01 (a).

[44] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.02 (b) (Vernon Supp. 1988), recodified at Tex. Health & Safety Code Ann. §534.-003 (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, amending Tex. Rev. Civ. Stat. Ann. 5547-203, §3.02 (c).

[45] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.09 (Vernon Supp. 1988), recodified at Tex. Health & Safety Code Ann. §534.-019 (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, 1991 Tex. Gen. Laws 2015, 2021, amending Tex. Rev. Civ. Stat. Ann. 5547-203, §3.09.

[46] Under Tex. Const. art. III, §52 a transfer of moneys between political subdivisions is illegal unless the donee is **contractually obligated** to spend the funds on governmental purposes of the donor. San Antonio River Authority v. Shepperd, 299 S.W.2d 920, 927-928 (Tex. 1957) (county's transfer of funds to river authority pursuant to contract which bound river authority to construct specific flood control facilities was legal); Harris County Flood Control Dist. v. Mann, 140 S.W.2d 1098, 1104 (Tex. 1940)

(6) the community center's board must annually submit to each participating local government a request for funds or in-kind assistance,[47]

(7) organizing the community center does not relieve the county of its statutory duty to care for the mentally retarded,[48]

(8) local governments are not required to establish or participate in a community MHMR center (community MHMR centers have **not** been created in many Texas counties[49]), and

(9) community centers are not mandated by the State to provide mental retardation services.[50]

Moreover, CONCHO VALLEY admitted (i) it is not listed in the legislature's biennial appropriations acts as a state agency or state department, (ii) does not pay its employees out of state bank accounts with state warrants, (iii) does not use the state seal on its letterhead, and (iv) does not have officers or board members appointed by the Governor. (CR 870-871, Adm. #29-32).

Agreeing to be a MRA or "designated provider" does not make CONCHO VALLEY a state agency. The State of Texas' operation of state school campuses for mentally retarded persons, and counties' caring for "idiots

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(county's funding of flood control district violates ban on public gifts).

[47] Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, 1991 Tex. Gen. Laws 2015, 2019 (Appendix J), adding §3.03 (b) to the Mental Health And Mental Retardation Act (Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.03 (b). This Act was enacted subsequent to the 1991 recodification of the MHMR Act in the Texas Health & Safety Code §531.001 et seq.

[48] Tex. Health & Safety Code Ann. §615.001 (Vernon 1992).

[49] TXMHMR Strategic Plan - Fiscal Years 1993-1998, SCR 80, last para.

[50] State law requires a community center to provide mental health, but not mental retardation, services. Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.12 (b), (c) (Vernon Supp. 1988); now Tex. Health & Safety Code §534.016 (Vernon 1992).

and lunatics" who could not be admitted to State facilities,[51] are mandated by the State and are acts of the sovereign.

However, the provision of mental retardation services in the community by community MHMR centers and private organizations has been structured far differently. These community services have been provided in a more businesslike manner, with community MHMR centers and private providers signing contracts with the State pursuant to which the State pays them to provide services to mentally retarded individuals.[52]

In the case of CONCHO VALLEY, its "sovereign" funding, meaning tax revenue that it received from its sponsoring government entities, was 3.7% of its total revenue in FY 1990 and 3.3% in FY 1991.[53] Most of its revenue was received as contractual payments for contractual services it performs.[54] CONCHO VALLEY did not seem to want to help those consumers who did

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[51] Formerly Tex. Rev. Civ. Stat. Ann. art. 2351, now codified at Tex. Health & Safety Code Ann. §615.001 (Vernon 1992).

[52] See multiple, voluminous contracts between CONCHO VALLEY, on one hand, and TDMHMR and TDHS, on the other. TDMHMR, broad range of MHMR services, 1988-1989, CR 3173-3246, 3253; TDMHMR, PPP/CP services, 1989 forward, SCR 249-254; TDHS, case management, 1990 forward, CR 3115-3122, 1199-1206; TDHS, Diagnostic Services, 1990 forward, CR 3165-3172, SCR 193-198; TDMHMR, broad range of MHMR services, 1990-1993, SCR 162-254, 255-342, 345-446, 448-533.

[53] CONCHO VALLEY's budget for FY 1990 shows $3,430,920 of revenue that includes $128,050 of city and county tax funds. SCR 164. FY 1991 budget shows $3,792,022 of revenue including $128,050 of city, county tax funds. SCR 310.

[54] For example, CONCHO VALLEY's FY 1991 general contract with TDMHMR was for $1,951,334, which was roughly half of CONCHO VALLEY's $3,792,022 total revenue. SCR 261-262, 310. CONCHO VALLEY's FY 1990 general contract with TDMHMR was for $1,658,835, out of CONCHO VALLEY's $3,430,920 total revenue. SCR 207, 164.

not generate lots of funding.[55]

Accepting designation by TDMHMR as a "mental retardation authority" ("MRA") or "designated provider" is a voluntary, contractual status, not a governmental one.[56] It is given to a provider that contracts with TDMHMR to provide MHMR services in the local area.[57] From 1988 through 1996 a community MHMR center had the right of first refusal with respect to being designated an MRA and designated provider and receiving the associated state contracts for its region.[58] If the community center declined the contracts or defaulted, however, TDMHMR could give the contracts, MRA status, and "designated provider" status to non-governmental organizations.[59]

Contracting with the State does not make one a state agency. Petitioner CRS operated under state ICF/MR contracts (CR 473-474), state standards and inspections, but was not a state entity. That contracts required an MRA to follow State regulations and policies is no different.

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[55] CR 490-491, para. 10e, 13 (Riggs aff.).

[56] Tex. Health & Safety Code Ann. §531.002 (9) (Vernon 1992); Tex. Rev. Civ. Stat. Ann. art. 5547-201, §1.02 (14) (Vernon Supp. 1988).

[57] Tex. Health & Safety Code Ann. §533.034, §533.035, §534.054 (c) (Vernon 1992); Act of May 24, 1991, 72nd Leg., R.S., ch. 569, §10, 1991 Tex. Gen. Laws 2024, amending art. 5547-204, §4.03 (c); Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

[58] The statutory preference given community centers was repealed effective Sept. 1, 1997. Act of May 24, 1997, 75th Leg., R.S., ch. 869, §5, 1997 Tex. Gen. Laws 2787, repealing Tex. Health & Safety Code §534.054 (b).

[59] Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §10, 1991 Tex. Gen. Laws 2024 (Appendix J), amending art. 5547-204, §4.03 (d); Tex. Health & Safety Code Ann. §534.054 (c), §534.064 (Vernon 1992); Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

QUESTION #4. Parker "State Action" Doctrine Not Incorporated Into Texas Antitrust Act. Petitioner respectfully submits that Texas' Third Court of Appeals lacked a colorable basis for its conclusion that §15.04 of the Texas Free Enterprise & Antitrust Act of 1983 incorporates the federal *Parker* "state action" doctrine. The ruling would turn federalism on its head and would immunize CONCHO VALLEY against damages liability for its brazen violation of federal medicaid law's "freedom of choice" requirement.

The Texas Free Enterprise and Antitrust Act of 1983 adopts federal judicial interpretations only if they promote competition in trade and commerce in Texas and provide the benefits of that competition to consumers. Tex. Bus. & Com. Code §15.04 (West 1994) states:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose. (underlining added)

That qualification in §15.04 excludes federal interpretations that sanction anticompetitive behavior, such as the *Parker* "state action" doctrine and other federal exemptions from the antitrust laws. The state appeals court inexplicably ignored this language. Incorporating *Parker* would harm economic competition and consumer welfare because it closes its eyes and permits anticompetitive, anti-consumer behavior. It does so not for economic good but out of deference to state sovereignty. F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (The only federal interpretation relating to exemptions that would be incorporated by §15.04 is the doctrine that antitrust exemptions are construed narrowly,[60] since it minimizes the areas where anticompetitive practices are tolerated.)

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[60] Federal courts narrowly interpret both statutory and implicit exemptions from the federal antitrust statutes. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12, 13 (1976).

Moreover, §15.04 merely calls for "harmony" with federal interpretations of comparable statutes. Since the *Parker* doctrine is based on a national government's deference to state sovereignty which a state does not owe itself, "harmony" with *Parker* does not require a State to adopt it. The most reasonable view of the Texas Legislature's intent is that it intended to adopt, not the federal *Parker* doctrine, but a "state action" doctrine doctrine of its own formulation: comprehensive, easy to apply, and drafted from a state perspective. The 68th Legislature did this in §15.05 (g), quoted earlier, exempting "actions required or affirmatively approved ..." by lawful statute or regulatory agency. Far less reasonable is the state appeals court's idea that the Legislature, after adopting its own "state action" doctrine, would (1) redundantly incorporate another "state action" doctrine (2) which is more awkward and tedious for courts to apply and (3) springs from the national government's deference toward co-sovereign states Texas does not owe itself.

Incorporating *Parker* into the Texas Antitrust Act would terribly weaken private enforcement of the medicaid requirement that consumers be free to choose their service provider without improper government interference. Since 1967 medicaid has required that States ensure a consumer's **right to choose among a range of qualified providers without government interference**. 42 USC §1396a (23); 42 CFR §431.51 (b) (1). In Briarcliff Haven, Inc. v. Dept. of Human Resources of Georgia, 403 F. Supp. 1355, 1362 (N.D. Ga. 1975) the Court stated:

> The "free choice of provider" requirement is designed to assure each Medicaid recipient a free choice among qualified providers of medical assistance and to guarantee that the state will not dictate to any Medicaid recipient where he or she must receive treatment.

Cf., Linton By Arnold v. Carney By Kimble, 779 F. Supp. 925, 936 (M.D. Tenn. 1990). The U.S. Supreme Court echoed this view in O'Bannon v. Town Court Nursing Center, 447 US 773, 785, 65 L.Ed.2d 506, 100 S.Ct. 2467, 2475 (1980), stating that this part of the medicaid law:

> "[G]ives recipients the right to choose among a range of qualified providers, without government interference."

Since 1979 Texas medicaid law has also mandated a consumer's right to

choose any provider authorized by TDHS to provide medicaid services.[61] Texas' Intermediate Care Facility/Mentally Retarded ("ICF/MR") program is financed mainly by medicaid. CR 491 para. 14-15. Most residential services for mentally retarded Texans are provided in ICF/MR facilities.[62] Texas medicaid paid $536.3 million to ICF/MR facilities serving 13,946 consumers in 1993. CR 550. TDHS directed the ICF/MR program from 1989-1993. CR 530, CR 474 para. 6.

Consumers are denied freedom of choice if they are not told who the available providers are. A center may advise regarding what are appropriate services for the consumer's needs, but must also advise who are the available providers of such services.

TDMHMR Memorandum. TDMHMR's Deputy Commissioner Jaylon Fincannon, in a 1990 Memorandum directed community centers to inform consumers and their families of all available ICF/MR facilities:

"Texas Department Of Mental Health and Mental Retardation

MEMORANDUM

December 21, 1990

TO: Superintendents, State Schools
Directors, State Centers
Executive Directors, MHMR Centers

FROM: Jaylon Fincannon,
Deputy Commissioner, Mental Retardation Services

SUBJECT: Information For Families Concerning Alternate Living Facilities

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[61] Tex. Hum. Res. Code Ann. §32.027 (a) (Vernon's 1993). Exceptions not relevant to the ICF/MR program were added, eff. Sept. 1, 1993, id. (Vernon's 1994). The State Medicaid Office of the Texas Health & Human Services Commission notes: "Clients must be allowed to use any Medicaid health care provider meeting program standards." Texas Medicaid In Perspective, May 1994, CR 525. Cf. The Texas Medicaid Plan, §4.10 (a).

[62] CR 550, Texas Medicaid In Perspective, May 1994.

Attached is a listing of certified ICF/MR facilities by county for your information and use. You should use this information as a reference as you consider alternate placement of individuals so recommended by your interdisciplinary teams. I am also asking that you provide this information to families of persons recommended for alternate placement. This information should also be provided to family members who you come in contact with through your Intake and Referral or public information services. The intent is to make as much information as possible available to persons who are considering such a decision so that they may be aware of all available resources.

This list is not to be considered as an endorsement for any particular facility. The actual referral of individuals and their families to a specific facility or facilities should be done on an individualized basis for the person needing the services.

We will be updating this list on a quarterly basis so that you may have the best information possible as you respond to persons with mental retardation , their families or other persons who seek information about alternate living arrangements in Texas. If other data could be added to this listing which would make it more useful, please contact Carole Smith at (512) 323-3261."

CR 461, 463, 466.

TDHS medicaid contracts. In contracting to provide medicaid services such as case management and diagnostic services[63], community centers promised to give consumers freedom of choice in selecting providers of services. CONCHO VALLEY signed two such contracts with TDHS in 1990, one to provide diagnostic and evaluation services to potentially retarded persons,[64] the other to provide case management services to mentally retarded persons.[65] The contracts (p. 3, para. 20; p. 4, para. 20) state: "[CONCHO VALLEY agrees] [t]hat all Medicaid recipients must be afforded freedom of choice unless otherwise limited by TDHS or TDHS' designee in selecting

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[63] CR 631, Texas Medicaid In Perspective, May 1994, definition of community MHMR centers.

[64] SCR 193, 195, CR 3165, 3169 (Carson aff.).

[65] CR 1199, 1204, CR 3115, 3120 (Carson aff.).

services and/or a provider of services and that services must be accepted voluntarily by Medicaid recipients." CONCHO VALLEY also agreed "to participate in any Texas Medicaid program applicable to ... mentally retarded persons, unless released from participation by TDMHMR in writing."[66] This would obligate it to cooperate with ICF/MR providers such as CRS.

TDMHMR's contractual "Community Standards". In its state contracts[67] CONCHO VALLEY agreed to follow the "TDMHMR Community Standards for Mental Retardation Services", which TDMHMR issued in 1988 ("TDMHMR Community Standards"). The TDMHMR Community Standards (CR 323 et seq.) repeatedly require community centers to fully inform consumers of all services available in the community. Relevant portions are excerpted in CRS' SJM response at CR 277-279 and can be examined in the Document itself at CR 329, 337-338, 341, 345, 436, 328, and 353.

TDMHMR's contractual case management rules. CONCHO VALLEY also contractually agreed to follow TDMHMR's case management rules which emphasize consumer choice. The relevant contract and excerpts from the rules are identified in CRS' SJM response at CR 279-280.

Question #5. CONCHO VALLEY Did Not Satisfy Minimum Due Process To Become A Lawful Community Center. Before an organization can claim a public charter and clothe itself with government immunity as a defense to injuring citizens, due process requires that minimum formative procedures be followed. Petitioner respectfully submits that MHMR Services For The Concho Valley did not fulfill such minimum requirements.

Texas' 1965 enabling legislation for community MHMR centers required a written contract between eligible founders as the cognizable, documentable article establishing a community center. None was ever executed or even discussed for MHMR Services For The Concho Valley.

Texas' Third Court Of Appeals says a written contract was not required by the statute (Appendix, 27), but that would void the statute for

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[66] "Contract For Services FY 1991" between TDMHMR and CONCHO VALLEY, at SCR 286, section M.

[67] See CONCHO VALLEY's general services contract with TDMHMR for FY 1990 (SCR 203-204, para. B.2. c.), and its PPP/CP contract with TDMHMR (SCR 250 para. #3) which began June 1, 1989 (SCR 250).

vagueness. It would deprive the law of an ascertainable standard for determining whether a community center had been established.

A. **Enabling Act plainly requires written contract**. The enabling act for community MHMR centers was adopted in 1965, as part of the Mental Health And Mental Retardation Act ("the Act") that created TDMHMR.[68] The enabling act contemplated that local agencies would establish the community center by written agreement. The center would then formulate a plan for serving its region, and then send the agreement and plan to TDMHMR to qualify for state grants. §3.01 (a) of the Act provided:

> One or more [local agencies] may **cooperate, negotiate, and contract with each other through their governing bodies to establish** and operate a center. (bolding added)

§4.01 made clear that the contract was to be in writing:

> As soon as possible after its **establishment**, a community center shall formulate and submit to the Department: (1) a copy of the **written agreement between the participating local agencies**; (2) a plan ... to ... make available to the residents of the region a full range of ... services.... (bolding added)

The only "written agreement" that §4.01 could be referring to was the "contract" called for in §3.01 to establish the community center. The Act provided for no other written agreement between the local agencies. A statute should be construed as a whole rather than through an examination of isolated provisions, and it should be read as if every word and phrase were deliberately chosen for a purpose. ADP Credit Corp. v. Sharp, 912 S.W.2d 490, 493 (Tex. App.-Austin 1996, writ denied).

B. **Using written contract was not optional**. §3.01 used "may" instead of "shall" to make whether to establish a center optional. Contracting was not optional. Making it so would void the statute for vagueness because it gives agencies no other measurable means to establish a center.

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[68] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, 1965 Tex. Gen. Laws 165-174, initially codified at Tex. Rev. Civ. Stat. Ann. art. 5547-201 et seq.

C. **Governing body approval of contract**. §3.01 required that the contract be made through the governing bodies. This assured a paper trail of intent. A city or county may contract only on express authorization of the city council or commissioners court by vote reflected in the minutes. City of Bonham v. Southwest Sanitation, 871 S.W.2d 765,767 (Tex. App.-Texarkana 1994, writ denied).

D. **Due process requires ascertainable procedure**. If the statute fails to specify an ascertainable procedure for creating a community center, it would be void for vagueness under the due process protection of U.S. Const. amend. V, XIV. Government statutes must be definite and certain to be valid. Lone Star Gas Co. v. Kelly, 165 S.W.2d 446, 448-449 (Tex. 1942); Sanders v. State Dept. of Public Welfare, 472 S.W.2d 179, 182, 185 (Tex. Civ. App.-Corpus Christi 1971, writ dism'd). Without a definite standard ,one cannot know whether a good faith, colorable effort has been made to comply.

E. **No colorable, good faith effort to conform to enabling act**. There is no evidence of a good faith, colorable attempt in San Angelo to comply with the straightforward procedure for establishing a community center: contracting in writing with authorization from the governing bodies.

(i) No evidence of written contract. There was no written contract between the participating agencies purporting to establish CONCHO VALLEY. (Appendix, 27.) No party has presented evidence[69] of a signed, partially signed, unsigned, or lost contract.

(ii) No evidence of governing body resolutions. Even more definitively, adverse parties present no evidence of (1) a resolution by any governing body agreeing to contract with others to establish CONCHO VALLEY or (2) a resolution authorizing the mayor or county judge to sign such a contract. Such resolutions were necessary since §3.01 required the contract be made through the governing bodies.

F. **Evidence proves lack of colorable compliance**. Though local agencies appointed board members and funded an MHMR operation that called itself a community center, they never achieved colorable, good faith compliance with the enabling act to create a statutory center:

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[69] CR 2802 (CV's Prod. #1, 07-09-97); CR 3917-3918 (City's Prod. #1-#3); CR 3895 (City's Interr. #3); .CR 2942 (CV's Interr., second para., 07-09-97); CR 2172 (CV, first para., 05-20-97); CR 1318, (CV Req. Prod. #1, 07-29-96); CR 872 (CV's Req. Adm. Nos. 41, 42, 07-28-95).

(1) August 31, 1968 contract "to develop a sound plan for organizing and operating a community center" that meets TDMHMR rules, between TOM GREEN COUNTY and TDMHMR,[70]

(2) governing body minutes in 1968 and 1969 from the CITY OF SAN ANGELO[71] and TOM GREEN COUNTY[72] discussing a proposed plan for establishing a community MHMR center,

(3) 1978 TDMHMR Audit Report,[73] saying in Finding No. 7, "[CONCHO VALLEY] Center did not have on record a contract entered into between the sponsoring agencies establishing the Center as required by Article 5547-203, Sec. 3.01(a) and Sec. 3.02 (b), V.A.C.S." CR 1702,

(4) CONCHO VALLEY's response to the 1978 Audit Report, arguing that a contract was not required in 1966, and "[i]t is questionable that a contract between the sponsoring agencies could be written at this time ....". CR 1702,

(5) CONCHO VALLEY's 1997 response to CRS' request for the written agreement required by §3.01: "Since at the time [CONCHO VALLEY] was established no such agreement was required by the cited statutes ... no such agreement could exist." (CR 2802, 2nd para.),

G. **Attempt to establish community MHMR center is void without good faith, colorable compliance with law**. Under Texas law, an organization is void (as opposed to voidable), cannot acquire de facto status, and may be attacked by private parties if there was not (i) **a good faith attempt to comply** and (ii) **colorable compliance** with the law. Private parties may collaterally attack the attempted organization if there was not "a good faith attempt to organize in the method prescribed by existing law, and at least a colorable compliance with that law." Hunt v. Atkinson, 12 S.W.2d 142, 145

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[70] CR 3386-3387, signed contract; CR 1970 commissioner court minutes.

[71] CR 2572, CR 2573, 7th par.; CR 2574, 3rd para.

[72] CR 1981; CR 1983, 3rd para.; CR 1985, 6th para.

[73] "Management Audit Report by the Community Services Division, TDMHMR, Austin, Texas, on the MHMR Center For Greater West Texas," dated June 23, 1978 (CR 1690), authenticated by affidavit by Daryl Dorcy (CR 1686).

(Tex. Comm'n App. 1929, judgm't adopted); set aside on other grounds, 17 S.W.2d 780 (Tex. Comm'n App.)

H. **1989 change in trustee selection procedure did not establish center**. In November-December 1989 CITY OF SAN ANGELO, TOM GREEN COUNTY, San Angelo Independent School District, and Angelo State University (ASU) adopted a new procedure for selecting CONCHO VALLEY board members.[74] They recited that they had agreed in 1966 to establish the CONCHO VALLEY organization. Far from displaying an intent to contract in 1989 to establish a new community center, it reflects a false assumption that CONCHO VALLEY was created 23 years earlier.

Further, ASU could not have helped establish a community center in 1989. A state university's right to do so ended in 1969 (see fn 39) and its participation in a trustee selection procedure approved and applied to a center created in 1989 would be void per se. Id.

I. **1989 change in trustee selection procedure raises fact issue, at minimum.** Even if a contract establishing CONCHO VALLEY was adopted at the end of 1989, fact issues arise as to when enough new trustees were appointed afterward to create a quorum, and how soon after that the center could apply for and secure lawful TDMHMR designation as an MRA/designated provider. Only then could it legally be the local referral center. Much of defendants' injurious conduct occurred before November 28, 1989 or within 18 months thereafter.[75]

PRAYER

Wherefore, Petitioner respectfully asks the U.S. Supreme Court to grant its petition for writ of certiorari.

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[74] CR 3846, 3848; CR 3859 (county); CR 3861 (city); CR 3862 (ASU); CR 3865, 3871 (SAISD).

[75] CR 475-477 (Cochran aff., para. 9-15); CR 488-491 (Riggs aff., para. 4, 6-16); CR 3031-3035 (Cochran aff., para. 18-27).